

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANDRE ROGERS,	§	
	§	No. 626, 2010
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No. 0901003188
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: January 18, 2012

Decided: March 20, 2012

Before **HOLLAND, JACOBS**, and **RIDGELY**, Justices

ORDER

This 20th day of March 2012, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) Defendant-Below/Appellant, Dandre Rogers appeals from his conviction and sentence for Second Degree Murder, Possession of a Firearm During the Commission of a Felony, and Possession of a Firearm by a Person Prohibited. Rogers raises two arguments on appeal. First, he contends that the Superior Court committed plain error in instructing the jury on the meaning of “cruel, wicked and depraved indifference to human life.” Second, he contends that the Superior Court committed plain error by failing to ask the jury, *sua sponte*,

whether it had certain Delaware Online news articles in its possession. We find no merit to Rogers' appeal and affirm.

(2) Wilmington Police responded to a report of a shooting at 713 North Church Street to find Derek Hoey bleeding on the front steps. Hoey was romantically involved with Tonya Backus, who resided at that address. Backus had previously dated Kenneth Miller for ten years, and the two had a daughter together.

(3) Hoey spent the night before the shooting at Backus's house. At approximately 4:00 a.m., Miller rang Backus's doorbell. Hoey opened the door and the two began arguing. The argument escalated and eventually moved into the house. Backus then saw Rogers, a friend of Miller's who had been waiting outside, run into the kitchen. She heard a gunshot and saw Rogers standing in the doorway to the kitchen with a gun. Backus ran upstairs and heard three or four more gunshots. When the firing stopped, Backus went back downstairs. She found Hoey lying on the front steps, having trouble breathing. By that time, Miller and Rogers had fled the scene. Hoey later died from multiple gunshot wounds.

(4) Rogers was arrested several months later in Fayetteville, North Carolina. Detective Simmons of the Wilmington Police Department interviewed Rogers. Rogers was charged with Murder Second Degree and the weapons offenses.

(5) At trial, Simmons testified that Rogers admitted to shooting Hoey in the thigh. An audiotape of Rogers' statement was played for the jury. Rogers testified in his defense that a person named "Tone" shot Hoey, and that he only told Detective Simmons he shot Hoey to protect Miller.

(6) The Superior Court instructed the jury on the lesser-included offenses of Second Degree Murder and Manslaughter, in addition to the charged offense of First Degree Murder. Both Second Degree Murder and Manslaughter require a finding that the defendant "recklessly caus[ed] the death of another person."¹ Second Degree Murder is distinguished from Manslaughter by the requirement that the defendant recklessly caused death "under circumstances which manifest a cruel, wicked and depraved indifference to human life."² The Superior Court provided the following explanation of this language to the jury:

Cruel, wicked and depraved indifference to human life is a statutory phrase used in the definition of murder in the second degree. But the phrase uses clear words of everyday use. The word cruel customarily refers to the malicious infliction of physical suffering upon living creatures, particularly human beings, or the unnecessary infliction of pain upon the body or the feelings or emotions. The word depraved has often been used to describe a mind that has ceased to care for human life. And the word wicked often is used in describing a bad or evil morality.

(7) During deliberations, the jury asked for clarification of the meaning of "cruel, wicked, and depraved." After consulting with counsel, the Superior Court

¹ 11 *Del. C.* § 635(1); 11 *Del. C.* § 632(1).

² 11 *Del. C.* § 635(1).

stated to the jury: “Please reread that jury instruction with regard to murder in the second degree, but also keep in mind that you are to construe these terms as stated in the statute in their common and approved usage in the English Language and in accordance with their commonly accepted meaning as you understand them as well.” The jury also asked: “[C]ould we please have the copy of the Delaware Online articles, (all of them please).” With consent from the parties, the Superior Court informed the jurors that they could refer to their recollection of the references to the articles made during testimony, but could not receive copies of the articles because the articles had not been admitted into evidence. The jury found Rogers guilty of Second Degree Murder and the possession offenses. This appeal followed.

(8) Because Rogers did not raise his claims below, we review them on appeal for plain error.³ “Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁴ “Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly

³ See Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”); *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

⁴ *Turner*, 5 A.3d at 615 (quoting *Wainwright*, 504 A.2d at 1100).

deprive an accused of a substantial right, or which clearly show manifest injustice.”⁵

(9) Title 11, section 635(1) of the Delaware Code states: “A person is guilty of murder in the second degree when: (1) The person recklessly causes the death of another person under circumstances which manifest a *cruel, wicked and depraved indifference to human life*.”⁶ The statute does not define the terms “cruel,” “wicked,” or “depraved.” Thus, the “commonly accepted meaning” of those terms should be employed when analyzing that element of second degree murder.⁷

(10) In *Waters*, this Court held that the Superior Court committed plain and reversible error by failing to charge the jury as to the commonly accepted language of “cruel, wicked and depraved indifference to human life.”⁸ There, the Superior Court made no attempt to define the language distinguishing Second Degree Murder from Manslaughter; rather, “it merely read the words of the statute to the jury.”⁹ We explained that the Superior Court’s “failure to attempt any definition or

⁵ *Id.*

⁶ 11 *Del. C.* § 635(1) (emphasis added).

⁷ See 11 *Del. C.* § 221(c) (“If a word used in this Criminal Code is not defined herein, it has its commonly accepted meaning, and may be defined as appropriate to fulfill the purposes of the provision as declared in § 201 of this title.”); 1 *Del. C.* § 303 (“Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.”); *Waters v. State*, 443 A.2d 500, 506 (Del. 1982).

⁸ *Waters*, 443 A.2d at 506.

⁹ *Id.* at 506 (emphasis added).

clarification of the statutory language for the jury's benefit" was a serious problem as it improperly led the jury to become involved in the sentencing process.¹⁰

(11) As distinguished from *Waters*, the Superior Court here provided a thorough definition of the statutory language at the outset and again after consultation with counsel. In its initial instruction, the Superior Court explained the meaning of "cruel," "depraved" and "wicked" in plain terms. The defense made no objection to these definitions. In its supplemental instruction, the Superior Court repeated its initial instruction and emphasized to the jury that the words "cruel," "wicked," and "depraved" should be given their "commonly accepted meaning." The parties expressly agreed with this approach. The Superior Court's initial instruction and supplemental instruction, taken together, "permitted the jury to properly discharge its function with the bounds of the law."¹¹ Rogers has failed to demonstrate plain error.

(12) Rogers' second claim also lacks merit. The parties engaged in a discussion with the court regarding the jury's request for the articles and all parties agreed on the pursued course of action. There was no reasonable basis to infer that the jury had some of the articles based solely on its request for "all of them." The Superior Court did not commit plain error when it failed to ask the jury, *sua sponte*, whether it possessed certain Delaware Online articles.

¹⁰ *Id.*

¹¹ *See Mills v. State*, 732 A.2d 845 (Del. 1999).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice